WONG SAU CHAN v. LUI LOK

[O.C.J. (Wan Suleiman F.J.) May 17, 1975]
[Seremban — Civil Suit No. 136 of 1972]

Practice and Procedure — Estoppel by judgment — Judgment not a judgment in rem — Whether plaintiff privy to either party — Vendor and purchaser — National Land Code, ss. 176(2) and 340.

In an earlier action the defendant sued an approved applicant of land and another party for a declaration that the purported assignment by the applicant to the third party was void. While that was pending the third party transferred the property to the plaintiff in this action. The plaintiff registered the transfer on the qualified title to the property. Subsequently the defendant obtained default judgment for the declaration sought. The plaintiff in this action sought to obtain a declaration *inter alia* that he was the registered beneficial owner of the land. The defendant contended that the plaintiff here was bound by the default judgment and estoppel *per rem judicata.*

Held: the default judgment did not bind the land itself, that is, it was not a judgment *in rem* and the plaintiff was not a privy to either party. Therefore the defendant could not raise the defence of estoppel by judgment.

CIVIL SUIT.

Stanley Ponniah (*Soo Lim Pang* with him) for the plaintiff.

Khaw Yew Mei (Miss) for the defendant.

Wan Suleiman F.J.: This is an action in which the plaintiff seeks to obtain:

(i) a Declaration that he is the registered beneficial owner of the land held under Qualified Title (M) No. 111, L.O. Plot No. 180, Mukim of Triang Ilir,

(ii) an Order under Section 417 of the National Land Code directing the Collector of Land Revenue, Jelebu to cancel the registration of the vesting Order dated January 4, 1971 as amended under Miscellaneous Document Jilid XI Folio 9 registered on January 21, 1972 at 9.40 a.m. on Qualified Title (M) No. 111, L.O. Plot No. 180, Mukim of Triang Ilir,

(iii) possession of the land held under Qualified Title No. 111, L.O. Plot No. 180, Mukim of Triang Ilir,

(iv) Mesne profit, and

(v) such further or other relief as this court may deem fit.

I shall set out the facts, in chronological order, which led to the filing of this action.

On July 18, 1960 an application for this piece of land was made by one Chong Ling who will (hereinafter be called the approved applicant) and which was duly enrolled as Approved Application No. 296/60 Mukim of Triang Ilir, Negri Sembilan.

On July 19, 1960 the Approved Applicant confirmed in writing that she had agreed to transfer the land to the defendant.

On July 30, 1963, the Approved Applicant applied for permission to assign her rights in respect of Approved Application No. 296/60 in favour of Tan Ming Chee (hereinafter called "Tan"). The Approved Applicant's application for permission to assign rights was registered and the following memorial was endorsed on the Register:

"Serial No. 556 Vol. VI Folio 56 A.A. No. 296/60 cancelled and A.A. No. 61/63 recorded in lieu thereof."

On May 27, 1967 documents of title to the land were issued and registered as Qualified Title (M) No. 111 for L.O. Plot No. 180 Mukim of Triang Ilir, State of Negri Sembilan (hereinafter to be referred to as "the said Q.T.") in the name of Tan as proprietor.

On November 20, 1968 the defendant commenced Civil Suit No. 236/1968 High Court, Seremban against the Approved Applicant and Tan.

On April 27, 1970 Tan executed a transfer of this said land to the plaintiff.

On July 26, 1970 the transfer of the land from Tan to the plaintiff was registered on the said Q.T.

On January 4, 1971 the defendant obtained judgment in default of appearance against Approved Applicant and Tan in Civil Suit No. 236/68.

On December 6, 1971 the defendant obtained order to amend judgment made on January 4, 1971 in Civil Suit No. 236/68.

On January 14, 1972 the defendant amended judgment order in Civil Suit No. 236/68 pursuant to order dated December 6, 1971.

On January 21, 1972 the vesting order in Civil Suit No. 236/68 in favour of the defendant was registered on the said Q.T.

On March 24, 1972 the plaintiff caused a private caveat in terms of section 322 (2) National Land Code 1965 to be registered against the said Q.T.

On August 7, 1972 the plaintiff commenced the present proceedings against the defendant.

Section 176(2) of the National Land Code provides:—

"Qualified title shall confer on the proprietor like rights in every respect as those conferred (as mentioned in section 92) by final title, save that —

(a) the boundaries of the land shewn on the document of title thereto shall be provisional only except so far as any of them may have been established by any earlier survey, and

(b) the land shall not be capable of being sub-divided or partitioned, or included in any amalgamation, nor shall any building thereon be capable of sub-division."

Section 92(1) in turn states:—

"The alienation of State land to any person or body under final title shall confer on that person or body a title to the land which shall be indefeasible as provided in Part Twenty" and

Section 340, which is in Part Twenty reads:—

"340. (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or mis-representation to which the person or body, or any agent of the person or body, was a party or privy; . . .

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2) —

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser."

The defendants argue that because of Order (6) of the judgment obtained by defendant against Chong Ling and Tan in Civil Suit No. 236/68 "the application for permission to assign rights (Bearing serial No. 551 . . . executed by the first defendant in favour of the second defendant is null and void", Tan had no title to pass to the plaintiff.

It should be noted that though defendant commenced Civil Suit No. 236/1968 against the approved applicant and Tan on November 20, 1968 it was not until January 4, 1971 that judgment in default of appearance was obtained against the two of them. In the meantime, Tan had executed a transfer of the land in favour of the plaintiff (on April 27, 1970), and this transfer was registered on the Q.T. on June 26, 1970.

It could therefore not be said that this registration, whatever the effect of the judgment in Civil Suit No. 236/1968 may be subsequently, had at the time it was effected, been an insufficient or void instrument.

There is no evidence whatsoever, nor indeed was it even suggested that the plaintiff was aware that Civil Suit No. 236/1968 had been filed by the defendant against the approved applicant and Tan, so that even if the registration of the transfer had been effected by means of an insufficient or void instrument, the proviso to subsection (3) of Section 340 would apply for indeed he was a purchaser "in good faith and for valuable consideration", to the tune of $12,000. In other words his title is indefeasible.

The defendant can only blame himself for this state of affairs. One would expect him to file a caveat at least at the time he filed the Civil Suit, on November 20, 1968, to prevent further transactions on this land.

I should perhaps say that I am inclined to believe that Tan was not aware that the Civil Suit had been filed against her. Under cross-examination she denied ever having received any writ of summons or any court document whatsoever connected with that action, and having moved, was not alerted by the alleged posting of a copy of the summons on the door of her previous abode. However her awareness or otherwise cannot affect the main issue.

The defendant also argues that subject to its being set aside, the judgment in Civil Suit No. 236/68 is conclusive as between the parties and their privies. . . .

No exception can be taken to this statement of the law. However, can the plaintiff be said to be privy to either of the parties in that Civil Suit?

The defendant submits that the expression "privies" includes privies in estate such as a vendor and purchaser, and because there had been no appeal against the judgment in Civil Suit No. 236/68 it would be conclusive as between the parties and their privies, and that defendant may plead the former judgment as an estoppel. Reference was made to *Whartons* "Law Lexicon" 14th Edition Page 802 which reads —

"Privies, those who are partakers or have an interest in any action or thing, or any relation to another. They have been said to be of six kinds:—

(1) . . . .
(2) . . . .
(3) Privies in estate, as grantor and grantee, lessor and lessee, assignor and assignee, etc.
(4) . . . .
(5) . . . .
(6) . . . ."

Clearly this is casting the net too wide. *Spencer-Bower and Turner* on *Res Judicata* 2nd Edition at page 211, paragraph 243 is enlightening on this point:

"The following are illustrative cases in which persons, admittedly not parties, have been held not to be privies either, but strangers to the estoppel. . . . A person who has merely given financial assistance to a party does not thereby become his privy, nor is a purchaser of land the subject of litigation, where the land itself is not bound by the judgment, deemed a privy of any party to such litigation and judgment."

The judgment in Civil Suit No. 236/68 does not bind the land itself, *i.e.* it is not a judgment *in rem*. The plaintiff is not therefore a privy to either party. In consequence the defendant cannot raise the defence of estoppel *per rem judicata*, and this defence must also fail. Accordingly there shall be judgment for the plaintiff in accordance with prayers Nos. (i), (ii), (iii) and (iv) and costs.

Judgment for the plaintiff.

Solicitors: *Stanley Ponniah, Ng & Soo; Joseph & Son.*

WONG KIM FATT v. LEONG & CO. SDN. BHD. & ANOR.

[O.C.J. (Chang Min Tat J.) June 20, 1975]
[Kuala Lumpur — Civil Suit No. 652 of 1974]

Companies — Articles of Association — Shares — Compulsory requisition of shares — Effect of — Companies Act, 1965, ss. 14(1) & 122(1).

The Company had two shareholders. In exercise of the powers under the Articles of Association the majority shareholder requisitioned for the purchase of the holdings of the other. The other resisted the attempt.

Held: the Articles empowering the requisition of shares of the only other holder is not repugnant to the Companies Act. It was purely a matter of contractual obligation and the plaintiff must be held to the obligation he had undertaken.

[Editorial Note: See [1975] 1 M.L.J. 20 & xxi.]

Cases referred to:-

(1) *Panorama Developments (Guildford) Ltd.* v. *Fidelis Furnishing Fabrics Ltd.* [1971] 3 All E.R. 16, C.A.
(2) *Browne v. La Trinidad* (1887) 37 Ch.D. 1.
(3) *Foss v. Harbottle* (1843) 2 Hare 461.
(4) *MacDougall* v. *Gardiner* (1875) 1 Ch. D. 13.
(5) *Welton* v. *Saffery* [1897] A.C. 299.
(6) *Ebrahimi* v. *Westbourne Galleries Ltd.* [1972] 2 All E.R. 492.
(7) *Scott* v. *Liverpool Corporation* 44 E.R. 1297

CIVIL SUIT.

Lim Ewe Hock for the plaintiff.

Syed Ibrahim for the first defendant.